

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6097

To be argued by:
Michael W. Lillie

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

CANADIAN JAVELIN LIMITED,

Defendant-Petitioner-Appellant,

JOHN C. DOYLE,

Defendant,

-and-

WILLIAM M. WISMER,

Defendant-Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-RESPONDENT-APPELLEE,

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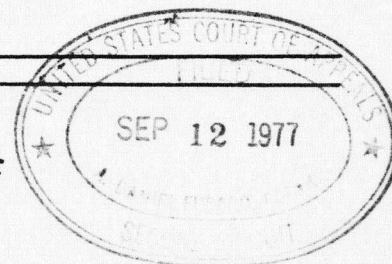


Table of Contents

	<u>Page</u>
Table of Authorities- - - - -	ii
Preliminary Statement- - - - -	2
Counterstatement of Issues Presented for Review- - - - -	3
Statement of Facts- - - - -	4
SEC Enforcement Proceeding- - - - -	4
Subsequent Events- - - - -	5
Argument- - - - -	8
I. Javelin Lacks Standing to Seek a Contempt Order Against Wismer- - - - -	8
II. There Is No Evidence That Wismer Violated His Stipulation- - - - -	16
III. There Is No Evidence That the Other Alleged Contemnors Were in Contempt of Court- - - - -	18
Conclusion- - - - -	20
Index to Supplemental Appendix	

Table of Authorities

<u>S.E.C. v. Vickers, Christy & Co., [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶91,487 (S.D.N.Y. 1965)-</u>	- - 10, 11
<u>Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors & Publishers, 375 U.S. 39 (1963)-</u>	- - - 14
<u>Shoenbaum v. Firstbrook, 405 F.2d 200 (2d. Cir.), modified upon rehearing en banc, 405 F.2d 215 (2d. Cir. 1968)-</u>	- - - 14
<u>Terminal R.R. Assoc. of St. Louis v. United States, 266 U.S. 17 (1924)-</u>	- - - - - 13
<u>United States v. American Society of Composers, Authors & Publishers, 341 F.2d 1003 (2d Cir.), cert. denied sub nom. Metromedia, Inc. v. American Society of Composers, Authors & Publishers, 382 U.S. 877 (1965)-</u>	- - -11, 12, 14
<u>United States v. Western Electric Co., 1968 Trade Cases ¶72,415 (D.N.J.), aff'd per curiam sub. nom. Clark Walter & Sons, Inc. v. United States, 392 U.S. 659 (1968)-</u>	- - - - - -12, 13

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Docket No. 77-6097

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

CANADIAN JAVELIN LIMITED,

Defendant-Petitioner-Appellant,

JOHN C. DOYLE,

Defendant,

-and-

WILLIAM M. WISMER,

Defendant-Respondent-Appellee.

BRIEF OF DEFENDANT-RESPONDENT-APPELLEE

This brief is submitted on behalf of defendant-respondent-appellee William M. Wismer ("Wismer") in response to the brief filed by defendant-petitioner-appellant Canadian Javelin Limited ("Javelin").

Javelin moved in the Court below for an order adjudging Wismer and others in contempt of an injunction which that

Court entered in 1974 and a stipulation which Wismer signed in connection therewith. The decision below denying Javelin's motion for contempt was rendered after two hearings before the Honorable Lloyd F. MacMahon. At the end of the second hearing, Judge MacMahon announced decision denying Javelin's motion. (A 179). Thereafter, the court rendered its endorsed opinion, stating as follows:

"Following oral argument, motion denied for lack of standing. Cf. United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003 (2d Cir. 1965)." (A 180)

PRELIMINARY STATEMENT

In late 1973, the Securities and Exchange Commission ("SEC") brought an enforcement action against Javelin, John C. Doyle ("Doyle"), Javelin's founder and principal, and Wismer, who up to to June 1974 was Javelin's President. In July 1974, such action was settled, resulting in judgments of permanent injunction against Javelin and Doyle. Wismer signed a stipulation in connection with such settlement. Both the injunctions and Wismer's stipulation contained various undertakings concerning the dissemination of certain information by Javelin or its subsidiaries.

Javelin management, controlled by Doyle, has long been engaged in bitter conflict with former Javelin

management, including Wismer. As part of such dispute, in February 1977 Javelin obtained a Canadian court order requiring Bison Petroleum & Minerals Limited ("Bison Petroleum"), a former Javelin subsidiary, to call a special stockholders' meeting. Wismer, President of Bison Petroleum, distributed various materials to the Bison shareholders pursuant to this court order. (A77-A78) Javelin claimed that the letter Wismer wrote transmitting such materials constituted violation of his stipulation and, therefore, contempt of court. When the SEC declined to do anything, Javelin sought to have Wismer held in contempt. Judge MacMahon, without reaching the question whether Wismer's transmittal of such letter constituted contempt, denied Javelin's motion on the grounds that Javelin did not have standing to seek a finding of contempt. (A 179)

COUNTERSTATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Does Javelin have standing to seek a finding of contempt in connection with the stipulation agreed to by Wismer in settlement of a SEC enforcement action to which Javelin was co-defendant, especially in view of the fact that Javelin can show no injury or threat of injury?
2. Is there any evidence whatsoever in the record which would establish contempt of court by Wismer?

3. Is there any evidence whatsoever in the record which would establish contempt of court by any other respondent?

STATEMENT OF FACTS

SEC Enforcement Proceeding

In December 1973, the SEC filed a complaint against Javelin, Doyle and Wismer. The SEC complaint charged defendants with violations of various of the federal securities laws. More particularly, defendants were charged with misleading public statements concerning a Javelin copper development project in Panama and a Javelin project in Newfoundland for the production of linerboard. (A90-A110)

The SEC action was settled in July 1974. As part of such settlement, Javelin consented to a permanent injunction ("Injunction") against violation of the securities laws. Doyle likewise consented to the Injunction. (A5-A19) No injunction was entered against Wismer, although Wismer signed a stipulation ("Stipulation") agreeing, subject to the contempt powers of the Court, to various undertakings in connection with Javelin, its subsidiaries and its affiliates. (A20-A24)

The Injunction to which Javelin and Doyle consented enjoined them from (a) obtaining money as a result of misleading

statements concerning Javelin or otherwise violating the federal securities law anti-fraud provisions; (b) selling or offering for sale Javelin securities unless a registration statement was on file with respect thereto; and (c) filing misleading reports with the SEC. (A6-A9) Wismer's Stipulation contained similar provisions as to Wismer. (A20-A23)

Under paragraph IV of the Injunction, Javelin agreed to certain undertakings, including the proposal and election of directors, 40 percent of whom were to be independent directors meeting various qualifications, the designation of an agent in the United States for service, the designation of a public information officer and a compliance committee to deal with the dissemination of information by Javelin or Javelin subsidiaries and the naming of a special counsel to review such information. (A9-A11) The Injunction against Doyle and Javelin provided that the SEC "may at any time apply to this Court for appropriate relief to enforce the terms of this Judgment." (A 13)

Wismer's Stipulation provided that Wismer would not disseminate information other than in accordance with paragraph IV of the Injunction, as summarized above. (A 23)

Subsequent Events

Since the settlement of the SEC action in July 1974, there has been no further significant activity in this case.

There has, however, been much activity involving the defendants, including Wismer. In July 1976, Wismer and certain other Javelin directors were ousted from their positions by Doyle and his nominees when the latter resumed control of Javelin management. Since that time there has been extensive litigation in the Canadian courts between the present Javelin management, consisting of Doyle and his nominees, and the former Javelin management, including Wismer. Such contests have included litigation involving Bison Petroleum, which has itself commenced a proceeding in Canada to wind up Javelin and have a liquidator appointed for Javelin. (A77-A78)

The litigation between Javelin and Wismer has also included a proceeding commenced by Javelin seeking a Canadian court order requiring Bison Petroleum to call a special shareholders' meeting. This proceeding resulted in a court order directing Bison Petroleum to call such a meeting on or before March 16, 1977. (A111-A113) Materials relating to such meeting were forwarded to the Bison Petroleum shareholders by a Wismer letter dated February 21, 1977. (A40-A46) The materials forwarded with the Wismer letter included a notice of the meeting, proxy, and an information circular. (A47-A56)

On February 21, the Boards of Directors of Bison Petroleum and Dominion Jubilee Corporation Limited ("Dominion Jubilee"), also a Javelin affiliate, by independent quorums and majorities of Directors, approved a transaction whereby Bison Petroleum agreed to purchase from Dominion Jubilee its wholly-owned subsidiary Jubilee Quebec Holdings Limited. (A79)

As part of this transaction, Bison Petroleum issued 3,276,287 shares of its stock to Dominion Jubilee. (Id.) This issuance of shares by Bison Petroleum to Dominion Jubilee wrested control over Bison Petroleum from Javelin, which prior to such issuance had owned 60.2% of Bison Petroleum's shares. (A85) As a result, Javelin has repeatedly sought to annul Dominion Jubilee's acquisition of the Bison Petroleum shares. Even before the time of the hearings below, Javelin had twice failed in such attempts. (A84-A85)

The allotment and issuance of these shares were authorized by the Bison Petroleum Board on February 21. The agreement reflecting the transaction was signed early in the morning of February 22. Wismer's letter of February 21 and the enclosed materials were mailed during the afternoon of February 22, after Dominion Jubilee had become owner of the Bison Petroleum stock. Wismer, conscious of the terms of the Stipulation, sought counsel's opinion whether he could send

his letter of February 21 in light of the issuance of stock to Dominion Jubilee and the fact that Bison Petroleum was no longer a Javelin subsidiary. Receiving counsel's opinion that he could, Wismer sent the letter. (A79-A80) Javelin, contending such letter violated the Stipulation, seeks to have Wismer held in contempt of court.

At the hearing below, the SEC fully explained its position regarding the Wismer letter, stating that it alone had standing to enforce the Injunction and Stipulation entered in its favor, that Javelin's position as an enjoined party defendant gave it no standing and that the SEC's decision whether to move for contempt or other relief would necessitate an investigation. (A164-A193)

ARGUMENT

I. Javelin Lacks Standing to Seek a Contempt Order Against Wismer

Judge MacMahon, without passing on the merits, denied Javelin's contempt motion for lack of standing.*

*In its brief, Javelin states on four separate occasions (Javelin Brief, pp. 2, 3, 14 and 20) that Judge MacMahon passed on the merits of Javelin's motion and found a "blatant violation" by Wismer of the Stipulation. These statements are nothing short of misleading. Judge MacMahon stated to Javelin his decision as follows:

"You have no standing. I see no need to get into further questions at this time." (A 179)

Under these circumstances, Javelin's reliance on an incomplete transcript of a colloquy between Judge MacMahon and counsel for Javelin is, to say the least, unpersuasive. While not strictly relevant to the basic issue herein of Javelin's standing, Javelin's tortured treatment of the transcript and its refusal to acknowledge this mistake has necessitated a motion by Wismer before Judge MacMahon for settlement of the transcript (A185-A192), which motion is presently pending.

This decision was correct, both under the applicable authorities and as a matter of sound policy.

Javelin has made no showing of injury or threatened injury to support its claim that it has standing to seek a finding of contempt against Wismer. The sole suggestion made in this regard by Javelin is that, as parent of Bison Petroleum, it could be held liable for a violation of the decree by Wismer, Bison Petroleum's President. Even putting aside the fact that Javelin was not the parent of Bison Petroleum when the Wismer letter was sent, there is simply no basis for this type of attribution of liability. Javelin could not conceivably be held liable for the actions of a corporation with which Javelin had long been in conflict and the actions of which were objected to (and contested) by Javelin management. When one realizes that this contempt proceeding itself is but one part of a long-standing series of battles between two groups contending for control of Javelin, Javelin's pretended fear of being held accountable for the actions of its adversary are somewhat ironic and ring false.

Javelin's real complaint is not about the threat of being held liable for Wismer's alleged violation of the consent decree but rather its loss of control over a former subsidiary. For redress of this injury Javelin has had available to it (and has used repeatedly) the Canadian courts. Javelin should not be allowed to bootstrap itself into a position where, despite its lack of injury, it can inject the federal courts into a dispute which is largely

one of Canadian law and which should be decided by the Canadian courts.*

It is notable that Javelin has not cited one single authority which supports its standing herein. To the contrary, each case which has considered the question of standing to enforce a decree obtained at the instance of a federal agency has confined such standing to the agency itself.

The case closest in point is the late Judge McLean's decision in S.E.C. v. Vickers, Christy & Co., [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91, 487 (S.D.N.Y. 1965). Responding to a motion for contempt by a private party and holding that a contempt motion could be brought only by the SEC, Judge McLean stated as follows:

" . . . Petitioners are not parties to this action. Even if they were, they would have no standing to institute contempt proceedings for alleged violation of the order and injunction which this court issued in 1961 upon the application of the Securities and Exchange Commission.

Amalgamated Workers v. Consolidated Edison Co.,
309 U.S. 261 (1940),

See Federal Trade Commission v. Kleaser [sic],
280 U.S. 19 (1929).

Amalgamated Workers v. Consolidated Edison Co., supra, involved the National Labor Relations Act. This court can find nothing in the Securities Act of

*Interestingly, Javelin terms its motion one to "punish" Wismer and the others for contempt, although it is clear that punishment is a use for criminal, not civil, contempt and that criminal contempt is a matter for the government alone to seek.

1933 or the Securities Act of 1934 which requires a different result. The Securities and Exchange Commission alone, acting in the public interest, can seek enforcement of this court's injunction. In this instance, the Securities and Exchange Commission requests no relief. Petitioners are seeking to use this court's contempt power to enable them to collect a private debt. Neither Act gives them any right to do this." Id. at 94,854. (Emphasis added.)

While Javelin rightly denotes the highlighted language in this statement as dictum, based upon Javelin's position as a party to the SEC action, Javelin does not show this to be a distinction with any substance. In the absence of any such showing, Judge McLean's statement is the most authoritative available and should be followed.

The cases upon which Vickers Christy was based and that case cited by the Court below lend full support to this result.

In United States v. American Society of Composers, Authors & Publishers, 341 F.2d 1003 (2d Cir.), cert. denied sub nom. Metromedia, Inc. v. American Society of Composers, Authors & Publishers, 382 U.S. 877 (1965), a radio and television station owner, Metromedia, moved to punish defendant ASCAP for violation of a consent decree entered in a government antitrust suit to which Metromedia was not a party. ASCAP had refused a Metromedia request for a license and Metromedia, after the government refused to initiate contempt proceedings, commenced such proceedings itself, con-

tending that such refusal violated the consent decree, which regulated ASCAP's licensing procedures. Noting that "the judgment is in favor of the United States alone" and that "it is not enough that Metromedia is indirectly or economically benefitted by the decree", 341 F.2d at 1008, the Second Circuit went on to say:

The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. Thus, the fact that the court retains jurisdiction in an antitrust action does not mean, unless the decree should expressly provide otherwise, that persons affected by the judgment, but not parties to it, can invoke the court's jurisdiction to alter or enforce the terms of the decree.

Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights. (341 F.2d at 1008)

Javelin's status as an enjoined party defendant does not give standing to enforce Wismer's Stipulation because such Stipulation was entered into solely in favor of the SEC and no injunction was granted in Javelin's favor or for its benefit.

Similarly, in United States v. Western Electric Co., 1968 Trade Cases ¶72,415 at 85,279 (D.N.J.), aff'd per curiam sub nom. Clark Walter & Sons, Inc. v. United States, 392 U.S. 659 (1968), the court denied an application for intervention in an antitrust case which had been disposed of by a

consent decree some twelve years earlier. The applicant for intervention sought to enforce the decree, alleging that its violation was injuring its business and that its efforts over the preceding six months to have the Department of Justice enforce the decree had been unsuccessful. In denying the application, the court noted that "the Government has not repudiated its obligation to act in the public interest in the enforcement of the decree", and that the Government was not ignoring the mandate of the court. Id. at 85,280. These same facts are evident in this case upon the record below. (A164-A173)

Javelin's lack of standing is also fully consistent with the provisions of paragraph 15 of this Court's injunction herein:

The Commission may at any time apply to the Court for appropriate relief to enforce the terms of this Judgment. (emphasis supplied)

If, in fact, any conduct of Wismer has injured or is injuring Javelin, the SEC may commence an action for appropriate relief, specifically framed to prevent and remedy such conduct.

In Terminal R.R. Assoc. of St. Louis v. United States, 266 U.S. 17 (1924), cited by Javelin, parties instituted contempt proceedings for violation of an antitrust consent decree to which they were co-defendants. The issue of their standing to do so was evidently not raised and was not dealt with by the Supreme Court, which reversed a finding of

contempt. It is also noted that in such case the government had appeared and argued in favor of the finding of contempt, 266 U.S. at 27, so that the matter of the non-government parties' standing was at best a moot question.

Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors & Publishers, 375 U.S. 39 (1963), also cited by Javelin, did not involve a contempt proceeding, but was merely a suit brought by a broadcasting company pursuant to provisions in a consent decree allowing for such suits. 375 U.S. at 40. See United States v. American Society of Composers, Authors & Publishers, supra at 1007.

Javelin's repeated assertions (Javelin Brief, pp. 2, 6, 14-15) that Wismer executed "mutual and reciprocal stipulations" with Javelin are simply incorrect, as the settlement papers themselves show (A5-A24). This apparent attempt to concoct some kind of contractual relationship between Wismer and Javelin must fail. Similarly, Javelin's statement (Javelin Brief, p. 14) that the "decree" was entered into for the benefit of Javelin and its shareholders is also somewhat ironic, since the basis for such decree was Javelin's own alleged wrongdoings.*

*Javelin's citation of Shoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), modified upon rehearing en banc, 405 F.2d 215 (2d Cir. 1968), is meaningless. Shoenbaum was a shareholder's derivative suit involving allegations of Rule 10(b)(5) violations by directors. The relevance of such a case to the issues before this Court is not apparent.

Much of Javelin's efforts in the Court below focused on what it claimed were federal securities violations by Wismer. Thus Javelin spends considerable time discussing whether the materials sent to the Bison Petroleum shareholders were accurate. This question is not before the Court. If there were misstatements made in such materials, Javelin, as a shareholder in Bison Petroleum, can utilize remedies under Canadian and United States law to establish such misstatements. Such allegations, however, are not within the scope of the Injunction and are irrelevant to this proceeding. If Javelin contends there was a violation of federal securities laws, it has ample recourse under the federal securities laws to remedy such violation. Simply because it may have determined that such a suit, like its litigation efforts in Canada, would prove unsuccessful, for whatever grounds, is no reason why it should be allowed to assert such violations via a contempt proceeding.

Javelin, referring to the docket herein, raises the question of a prior decision by Judge MacMahon regarding a proceeding commenced in the Canadian courts to declare the Injunction null and void. Javelin suggests that Judge MacMahon, on his own initiative, required Javelin to appoint special counsel for such proceeding, "notwithstanding that Special Counsel, a defendant in that suit, was fully capable of handling it". (Javelin Brief, p. 12). Once again,

Javelin has misstated the facts. As shown in the Supplemental Appendix annexed hereto (A183-A184), the SEC itself sought the appointment of Canadian counsel in such proceeding and Javelin's Special Counsel was directed to defend on behalf of Javelin. The motion, after all, appears to have been only a motion dealing with the question of having local counsel in the Canadian Courts. Suffice it to say that this earlier proceeding was entirely inapposite to the present question before this Court.

Javelin also makes much of Doyle's status as a fugitive from justice, asserting that Javelin was unfairly made the scapegoat of Doyle's sins. (Javelin Brief, p. 11.) The import of this suggestion is unclear; since Doyle's "sins" hardly cure an otherwise fatal defect in Javelin's standing, it is difficult to see their relevance.

II. There Is No Evidence That Wismer Violated His Stipulation

Although there is dispute as to what conclusion is to be drawn from Wismer's conduct, there is no material dispute as to the facts, which are summarized above. Upon such facts, and as a matter of law, Wismer did not violate the Stipulation. Accordingly, even if Javelin were found to have standing, this Court should enter an order directing the District Court to deny Javelin's motion on the merits.

Wismer sent his letter to shareholders on February 22. Wismer did not submit such letter to any Javelin public

information officer, compliance committee or special counsel. As Wismer explained (A78-A84) he did not do so because at such time Bison Petroleum was not a Javelin subsidiary.

The Wismer Stipulation states that Wismer shall not disseminate information except as provided in paragraph IV of the Injunction. (A23) Paragraph IV(5) of the Injunction is specifically limited to "dissemination of information by Javelin or any of its subsidiaries" (A10) Paragraph IV(7) is similarly limited to Javelin and its subsidiaries. (A11) These limitations are to be contrasted with the language consistently used throughout the other sections of the Injunction, which are phrased in terms of "Javelin, its subsidiaries or affiliates." (See, e.g., Injunction ¶II(a)) (A6) The implication is clear: Paragraph IV of the Injunction, which is the only paragraph applicable to Wismer, does not regulate dissemination of information by a Javelin affiliate, and did not apply to Wismer's letter on behalf of Bison Petroleum, which was a Javelin affiliate at the time the letter was sent.*

This interpretation of the Injunction is not only dictated by the clear language of the Injunction but is also consistent with its application during the three-year period since it was entered. For instance, it is not disputed that the public statements of at least two Javelin affiliates were never subjected to the Injunction's clearing procedures during this period. (A83-A84)

*Javelin's own brief acknowledges that the Injunction provisions govern only dissemination of information by Javelin and its subsidiaries. (Javelin Brief, p. 5.)

In short, since Bison Petroleum was not a Javelin subsidiary at the time the Wismer letter was mailed, the Stipulation did not apply to such transmission.

III. There Is No Evidence That the Other Alleged Contemnors Were in Contempt of Court

In the Court below, Javelin sought a contempt citation not only against Wismer, but also against certain other directors of Bison Petroleum. Having failed to adduce any evidence relative to these others, Javelin has evidently elected not to continue as against these other respondents, and the proceeding, accordingly, should be dismissed as to them. In any event, Javelin's motion insofar as it is directed at such other respondents is without even colorable basis. Just as Wismer's letter did not constitute contempt as to him, a fortiori it did not constitute contempt as to them.

The basis for Javelin's motion against these other Bison Petroleum directors is unclear. None of them was a party to the SEC proceeding, none entered into any consent or stipulation relating thereto and none falls within the language of the Injunction defining its scope to "Javelin, its officers, agents, servants, employees, directors, and those persons in active concert and participation with it...." (Injunction ¶ 1) (A6) Regardless of the applicability

of the Injunction to Wismer, therefore, it is clearly inapplicable to the other respondent Bison Petroleum Directors and the proceeding should be dismissed as to them as a matter of law.

In addition, as Wismer acknowledged below, he alone sent the letter which Javelin objects to, and the other respondents were not even aware that such letter was being sent. (A86-A87) This statement is not disputed. Under these circumstances, there is no basis whatsoever for a finding that such others were in contempt of court, assuming arguendo that the Injunction applied to them.

Conclusion

It is not Wismer's sending of his letter to which Javelin objects; it is Javelin's loss of control over Bison Petroleum. Although this is a matter upon which Javelin can pursue its remedies if it so desires, it has nothing to do with the Stipulation which Wismer signed earlier in this litigation, which Stipulation was entered solely for the benefit of the SEC and which the SEC alone should be allowed to enforce. Accordingly, Judge MacMahon's decision denying Javelin's motion for contempt should be affirmed in all respects.

Dated: New York, New York
September 9, 1977

Respectfully submitted,

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Of Counsel:

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INDEX TO
SUPPLEMENTAL APPENDIX

ORDER.....	A-183
MOTION TO CORRECT TRANSCRIPT.....	A-185
AFFIDAVIT OF MICHAEL W. LILLIE IN SUPPORT OF MOTION.....	A-187
EXHIBIT A TO LILLIE AFFIDAVIT	
TRANSCRIPT OF MAY 12, 1977 HEARING (Reproduced as Pages A159 -A179).....	A-190
EXHIBIT B TO LILLIE AFFIDAVIT	
ENDORSED DECISION (Reproduced as Page A180).....	A-191
SUGGESTED ORDER.....	A-192

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CANADIAN JAVELIN LIMITED

JOHN C. DOYLE

WILLIAM M. WISMER,

Defendants.

73 Civil 5074 LFM

ORDER

Whereas plaintiff Securities and Exchange Commission
Meyer Eisenberg
moved this Court to require Canadian Javelin Limited to appoint/
counsel and to pay counsel's fees and expenses in the matter
of Harold W.H. Smith v. Canadian Javelin Limited, Securities
and Exchange Commission, and Meyer Eisenberg, an action brought
by plaintiff Smith in the Supreme Court of Ontario;

Whereas plaintiff's motion having been amended to author-
ize Eisenberg to retain qualified Canadian counsel to represent
Canadian Javelin in the matter pending before the Supreme Court
in Ontario, Canada, and upon the oral arguments made by the
parties during a hearing before this Court on December 19, 1975;
and upon all the papers and proceedings herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Canadian
Javelin Limited appoint Meyer Eisenberg, Esq., to appear and
defend on behalf of Canadian Javelin Limited, and to protect
the subject matter of this case, and to retain Canadian
counsel qualified to represent Canadian Javelin Limited in
connection with Smith v. Canadian Javelin Limited, et al.;

-2-

IT IS FURTHER ORDERED that Canadian Javelin Limited pay *fees and expenses to be paid by the court* fees and expenses of Eisenberg and his counsel in connection with the defense of the case pending in the Supreme Court of Ontario.

AND IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

104

United States District Judge

Dated:

12/19/75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, : 73 Civ. 5074
(LFM)

-against- :

CANADIAN JAVELIN LIMITED, :
JOHN C. DOYLE and :
WILLIAM M. WISMER, :

NOTICE OF MOTION

Defendants. :

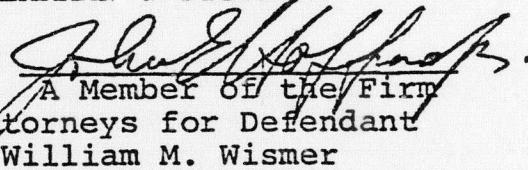
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PLEASE TAKE NOTICE that upon the affidavit of Michael W. Lillie dated September 9, 1977, the transcript of the hearing before this Court on May 12, 1977 and upon this Court's endorsed decision filed May 19, 1977, the undersigned will move this Court, before the Honorable Lloyd F. MacMahon, at the United States Courthouse, Foley Square, New York, New York, in Room 618 on September 23, 1977, at 2:15 p.m., or as soon thereafter as counsel can be heard, for an order in the form attached hereto correcting the reporter's transcript of page 5 of the hearing on May 12, 1977, a copy of which is page A-163 of the record on appeal herein, settling the differences between the parties, amending the record to conform to the truth

and directing the clerk to enter the record as so amended as the record on appeal.

Dated: New York, New York
September 9, 1977

SHEARMAN & STERLING

By 

A Member of the Firm
Attorneys for Defendant
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	73 Civ. 5074
Plaintiff,	:	(LFM)
-against-	:	
CANADIAN JAVELIN LIMITED,	:	<u>AFFIDAVIT</u>
JOHN C. DOYLE and	:	
WILLIAM M. WISMER,	:	
Defendants.	:	

-----X

MICHAEL W. LILLIE, being duly sworn, deposes
and says:

1. I am an attorney and am associated with
the firm of Shearman & Sterling, attorneys for
defendant William M. Wismer ("Wismer"). I make this
affidavit in support of Wismer's motion to settle the
Transcript ("Transcript") of the hearing before this
Court on May 12, 1977.

2. Defendant Canadian Javelin Limited
("Javelin") moved this Court for an order holding
respondent Wismer and others in contempt of an injunction
entered by this Court and a related stipulation signed
by Wismer in this action in July 1974.

3. Two hearings on Javelin's motion took place before this Court on May 5, 1977 and May 12, 1977. At the end of the second hearing, this Court stated to Javelin as follows:

"You have no standing. I see no need to get into further questions at this time." (Transcript, p. 21)

A copy of the Transcript, in the form that such Transcript is presently part of the record on appeal, is appended hereto as Exhibit A.

4. This Court's endorsed decision dated May 19, 1977, stated as follows:

"Following oral argument, motion denied for lack of standing. Cf. United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003 (2d Cir. 1965). So ordered."

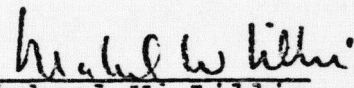
A copy of the endorsed decision is appended hereto as Exhibit B. As evidenced by this Court's decision as announced at the end of the second hearing, it is quite apparent that this Court never intended to pass upon the merits of Javelin's motion for contempt.

5. However, in its brief on appeal, Javelin has referred several times to page 5 (A-163) of the Transcript of such hearing before this Court, claiming that the Court found a "blatant violation" of its decree.

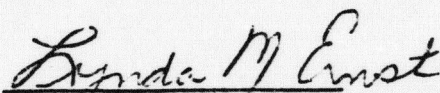
6. While, of course, I do not independently remember this Court's exact words, it is my recollection that the Court stated in essence that if Wismer's actions constituted such a blatant violation of the decree, the Court thought it would be the duty of the Securities and Exchange Commission to enforce the decree, and that this Court did not at such hearing state that the alleged actions of Wismer constituted, in fact, a "blatant violation" of this Court's decree. Accordingly, it is respectfully submitted that the last paragraph of page 5 of the Transcript should read as follows:

"THE COURT: I adjourned this last week to hear what the SEC has to say. If it is such a blatant violation of the decree, I would think it would be fundamentally the duty of the SEC to enforce the decree. Since they are not, I want to know why."

7. For the reasons set forth above, it is respectfully requested that this Court settle the Transcript in order to properly reflect this Court's statements at the May 12 hearing.


Michael W. Lillie

Sworn to before me this
9th day of September, 1977


Notary Public

LYNDA M. ERNST
Notary Public, State of New York
No. 004511557
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1979

EXHIBIT A TO LILLIE AFFIDAVIT - TRANSCRIPT OF
MAY 12, 1977 HEARING (Reproduced as Pages
A159-A179)

A-191

EXHIBIT B TO LILLIE AFFIDAVIT - ENDORSED
DECISION (Reproduced as Page A180)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	73 Civ. 5074
	:	(LFM)
-against-	:	
CANADIAN JAVELIN LIMITED,	:	ORDER CORRECTING
JOHN C. DOYLE and	:	STENOGRAPHER'S
WILLIAM M. WISMER,	:	<u>TRANSCRIPT</u>
	:	
Defendants.	:	

-----x

A motion having been made before this Court on September 9, 1977, upon notice of motion by the attorneys for defendant William M. Wismer ("Wismer"), praying for an order correcting the reporter's transcript of a hearing on May 12, 1977 of defendant Canadian Javelin Limited's motion seeking to hold Wismer and others in contempt of court, and counsel for the parties having been heard, and the court having considered the affidavits of said counsel, and it appearing that a statement of such transcript on page 5 is erroneous, it is

ORDERED that the stenographer's minutes of the last paragraph of page 5 of such transcript be and they hereby are corrected to read as follows:

"THE COURT: I adjourned this last week to hear what the SEC has to say. If it is such a blatant violation of the decree, I would think it would be fundamentally the duty of the SEC to enforce the decree. Since they are not, I want to know why."

IT IS FURTHER ORDERED that this order be included in the record on appeal from the judgment herein, to the Court of Appeals, Second Circuit, in order to disclose the circumstances relating to said omission.

Dated: New York, New York
September 9, 1977

United States District Judge

[illegible]

MICHAEL W. LITTLE , being duly sworn,
says: that I am over the age of eighteen years and am not
a party herein, and that on the 12th day of September, 1977
at about 11:30 A.M. , I served a true copy of the within
BRIEF

within the City and State of New York, directed to said attorneys at their respective addresses given below, which were designated by them for that purpose upon the preceding papers in this action, to wit:

<u>Name</u>	<u>Address</u>	<u>Attorney for</u>
Jon D. Jensvold, Esq.	Securities and Exchange Commission 500 North Capitol St. Washington, D.C. 20549	Securities and Exchange Commission

Michael W. Lillie

Sworn to before me this
12th day of September 1977

Sydney M. Ernst
Notary Public

LYNDA M. ERNST
Notary Public, State of New York
No. 30-4511557
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 19...79

AFFIDAVIT OF
PERSONAL SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

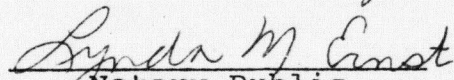
MARK BARRETT, , being duly sworn, says:
that deponent is not a party to the action, is over 18 years
of age and resides at 117 Seaman Avenue, New York, New York 10034.
That on the 9th day of September, 1977 , deponent
served the within Brief by
personally serving a copy of same on each of the following:

<u>Name</u>	<u>Address</u>	<u>Attorney for</u>
Irving L. Golomb, Esq.	Diamond & Golomb, P.C. 99 Park Avenue New York, New York 10016	Canadian Javelin



Mark Barrett

Sworn to before me
this 9th day of September 1977



Notary Public

LYNDA M. ERNST
Notary Public, State of New York
No. 30-4311557
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1979